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Linda McCulloch
Superintendent

February 24, 2005

Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Avenue, SW
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Washington, DC 20202-2641

Attention: Troy R. Justesen

This letter is in response to the December 29, 2004, Department of Education's notice of request for comments and recommendations on regulatory issues under IDEA 2004. Following a careful review of the language in IDEA 2004, the Office of Public Instruction is commenting on the following specific issues.

Highly Qualified Teacher Requirement

In IDEA 2004, Congress established a limitation on the right of action on behalf of a student or class of students for the failure of a state or local education employee to be highly qualified [Sec.602(10)(E)]. The purpose of this provision is to ensure that teachers are protected from complaints related to the teacher's standing on the definition of being "highly qualified."

The law is silent with regard to how a state should meet its general supervisory responsibility for ensuring that provisions for "highly qualified" teacher standards are met. Findings of non- compliance, whether they are the result of state monitoring or a result of the filing of a complaint by an individual, are the same. In each case, a strict timeline is established for coming into compliance. Congress would not have enacted this provision if it did not intend to protect teachers from becoming the cause of findings of noncompliance.

Recommendation: Regulations should be adopted to clarify that the sole remedy for a finding that a teacher is not "highly qualified" are the provisions defined under NCLB and that such failure to meet the standard does not imply the failure to provide FAPE.

Related Services (specifically, Cochlear Implants)

In IDEA 2004, Congress amended the definitions of Assistive Technology Device [Sec. 602(1)(B)] and Related Services [Sec.602(26)(B)] to clearly specify that these terms do not include a medical device that has been surgically implanted. Since a Cochlear Implant (CI) is a medical device that has been surgically implanted, it cannot be considered to be an assistive technology device under IDEA and, therefore, schools cannot be obligated to provide the assistive technology device or servicing of the device.

“Mapping," or programming of the Cochlear Implant to deliver an amount and type of electrical stimulation appropriate for the user, is a complex device maintenance procedure, that requires skills, expertise and equipment beyond the usual expertise of special education related service providers.

Recommendation:
Because the mapping/programming of the CI device must be done regardless of whether the child attends school, it requires additional equipment and expertise beyond what is generally expected of related service providers, and IDEA 2004 specifically excludes Cochlear Implants as a related service or assistive technology device, the regulations under IDEA 2004 should specifically state that the mapping/programming of a Cochlear Implant device is not considered as a related service under IDEA.

Private Schools: (Students Parentally Enrolled In Private Schools)

In IDEA 2004, new language was added [612(10)] which placed the responsibility for child find, provision of services to parentally placed private school children and the calculation of the proportionate share on the public school that serves the private school. This language uses the words “in the school served by the local education agency.” Different states interpret differently the responsibility of which local education agency is responsible to serve children attending a private school. In Montana, it is the responsibility of the district in which the student resides, not the district of residence of the parents nor the district in which the private school is physically located, to offer FAPE, to calculate the proportionate share and to provide agreed-on services through a service plan to IDEA-eligible students parentally enrolled in the private schools.

In low-population density states with many small school districts, interpreting the term “the school served by the local education agency” to mean the physical location of the private school building is unnecessarily restrictive. For those public schools where the private school is substantially larger than the public school, using the physical location to determine responsibility would be disruptive. For those situations where the private school is substantially larger than the public school, the federal Part B funds available to the public school and the proportionate funds available for services for children attending the private school would both be substantially reduced.

Recommendation:

The regulations under IDEA 2004 should provide appropriate flexibility, recognizing that each state may have different policies defining “the school served by the local education agency.” Population density and relative school size have resulted in Montana adopting policies that place responsibility for FAPE and provision of services to parentally enrolled private school students on the district where the student resides. Federal regulations should reserve for the state the authority to determine the meaning of “the school(s) served by the local education agency(ies).”

Surrogate Parent

Montana statutes and administrative rules provide important procedural protections for both the parent and the student. We recognize the long-term impact of decisions regarding a child’s special education program. Good decisions require stable and consistent parent involvement. Under Montana law and regulation, a surrogate parent may not be appointed for an IDEA-eligible student when parental rights have not been permanently extinguished under state law. This provision has been made to ensure that the parents of children, who are in temporary custody of the state, can maintain their involvement in the education of their child.

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The desire for long-term involvement of parents is also reflected in Montana administrative rule that states that the foster parent may not act as a parent unless the foster parent has had an on-going, long-term parental relationship with the student. This rule was implemented to help ensure that those children who move frequently across foster placements have a surrogate parent appointed who will have a long-term relationship with the child's educational program and be better prepared to make sound educational decisions.

Recommendation:

We strongly believe that the long-term involvement of parents is an important key to the success of any special education program. Regulatory guidance addressing the surrogate parent appointment process [Sec 615(b)(2)(A)] is needed in three key areas. We recommend that federal regulations:

- Reserve for the state the authority to define the term "ward of the state." Doing so would allow states that use "temporary custody" to continue to involve the child's parents in decisions related to special education. In Montana's case, we would define "ward of the state" to mean a student whose parents have had their rights permanently removed by an act of a court of competent jurisdiction.

- Reserve for the state the authority to define when a foster parent relationship with a child, whose parents have had their rights permanently removed, reaches the threshold of the foster parent "acting as a parent."

- Clarify that for an unaccompanied homeless youth whose parents' rights have not been extinguished, the parents be involved in their child's special education unless the child meets state law and regulation for surrogate appointment.

We appreciate your consideration of these important issues concerning IDEA regulations. If you need further clarification, please contact Bob Runkel at 406-444-4429 or at brunkel@mt.gov.

Sincerely,

Linda McCulloch
Superintendent of Public Instruction